



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

Miscellaneous Application 597 of 2009

STANLEY MUGACHA T/A GALAXY AUCTIONEERS.....APPLICANT/RESPONDENT

VERSUS

MAERSK KENYA LIMITED.....RESPONDENT/APPELLANT

RULING

1. The Notice of Motion dated 10th February 2010 is brought under the provisions **of rule 55 (4) and (5) of the Auctioneers Rules (1977) and section 79(g) of the Civil Procedure Act** among other provisions. The applicant is seeking for the firm of **Oraro and Company Advocates** to be allowed to come on record to act for the respondent in place **of Mugoye & Associates Advocates**. They are also seeking for a temporary order of stay of execution of the order of the Deputy Registrar dated 1st February 2010 until the hearing of the appeal. Lastly they are seeking for the extension of time within which to file an appeal under **rule 55 of the Auctioneers Rules**.

2. This application is based on the grounds that the ruling was delivered on 1st February 2010 by the Deputy Registrar who taxed the auctioneers fees at Ksh.3,025,368/-. However counsel who was representing the applicant did not advise them of the outcome of the decision by the Deputy Registrar until 3rd February 2010. It was not until the 5th of February 2010 when the applicant secured a hand written ruling. The applicant further states that, it was not until the 8th of February 2010 when they sought the opinion of the present lawyers and they were advised that the ruling raises serious fundamental matters that if appealed, have high chances of success. Thus according to the applicants it is necessary to obtain leave of the court to file an appeal and also to obtain leave to come on record. This

application is supported by the affidavit of **Stella Kariuki** the legal officer of the applicant sworn on 10th February 2010.

3. This application was opposed by the respondent on three principle grounds. Firstly, the competence of the application was challenged. It was submitted that the firm of **Oraro and Co. Advocates** failed to comply with the mandatory provisions of order 3 rule 9(a) of the Civil Procedure Rules. They are not properly on record as they failed to seek the leave of the court. Secondly, the applicant cannot file an omnibus application seeking for leave to represent the applicant and seeking for other orders of stay of execution and leave to appeal. The advocate for the applicant ought to have sought leave to come on record first and fore most in compliance with the provisions of Order 3 rule 9(a) of the Civil Procedure Rules which is written in mandatory terms. Lastly, the ruling sought to be appealed against was delivered on 1st February 2010 and an appeal was purportedly filed on 10th February 2010 without the leave of the court.

4. The matters raised in this application fall under the Auctioneers Rules which provides for Seven days within which an appeal should be filled after the taxation of the costs. There is therefore no appeal before the court and Counsel for the respondent urged the court, if inclined to grant a stay, it should be granted on condition that the entire costs awarded to the Auctioneers be deposited in an interest earning account in the joint names of the advocates so that the respondent does not suffer loss should the appeal be dismissed and while bearing in mind that litigation in Kenya takes a long time.

5. The above are the salient matters raised in this application, the affidavits and the rival submissions. It is common ground that the auctioneers bill of costs was taxed and by a ruling dated 1st February 2010 the Auctioneer was awarded Ksh.3,022,368/-. Being aggrieved of the ruling the respondent filed a notice of appeal however that notice was filed three 3 days late instead of 7th February, it was filed on the 10th February 2010. The respondent also changed lawyers, as it was represented by the Firm of **Mugoye & Associations** but this application was filed by **Oraro & Company** who also sought leave to come on record on behalf of the on behalf of the respondent.

6. This procedure that was adopted by the applicant has seriously been challenged by the counsel for the auctioneer who submitted that an application is bad in law for failure to comply with the mandatory provisions of order 3 rule 9(a) which requires the advocate who was acting previously be notified. This

is indeed a good practice to ensure that the advocates who was on record is notified of any change but the issue I have to address is whether failure to notify the firm of **Mugoye and Associates** who were acting for the respondent has occasioned any injustice or prejudiced the applicant. As stated above it is a good practice to notify counsel when there is a change of advocates. However, I have also taken notice that is a miscellaneous matter that involved taxation of the Auctioneers Costs is strictly speaking not a suit as is envisaged under the Civil Procedure Rules. This is a matter under the Auctioneers Act, and the rules made there under.

7 Since I am not able to discern any prejudice that was suffered by the auctioneer and taking into consideration the overriding objective that guides this court to ensure a just determination of the matters, I find the application is **not** totally defective. Counsel who was replaced by the firm of **Oraro & Company** will be at liberty to raise any issue at any stage or even to file their own Bill of Costs against the respondents. I accordingly grant leave to **Oraro & Company Advocates** to come on record. Regarding the issue of whether leave to file appeal should be granted, I find the delay of three days is not inordinate, the affidavit of **Stella Kariuki** has explained the reasons for delay of three days and it has also not inconvenienced or caused any prejudice to the Auctioneer.

8. The last issue is whether the respondent should be given stay of execution pending the hearing of the appeal. The principle element to consider on whether or not to grant the stay are well settled in a long line of authorities. One such leading decisions is the case of **Butt vs Rent Restrictions Tribunal Civil Appeal No. NAIROBI 6 OF 1979 (unreported) Madan JA** (as he then was). He held:

“It is in the discretion of the court to grant or refuse stay but what has to be judged in every case is whether there are or not particular circumstances in the case to make an order staying execution. It has been said that the court as a general rule ought to exercise its best discretion in a way so as not to prevent the appeal if successful from being nugatory, per Brett L.J. in Wilson v. Church (N.2) 12 Ch.D. (1979) 454 at p.459.”

9. The overarching consideration is the special circumstances of ease case, in this case I find the application was filed without undue delay. The respondents intends to challenge the award of the auctioneers fees in the sum of Ksh.3,025,368/-. The other element to take into consideration are the provisions of **Order 41 rule 4(2) of the Civil Procedure Rules** which provides that the court should be

satisfied that substantial loss may occur to the applicant unless the order of stay is granted and the court should order security for due performance of the decree. In this case the sum involved and which is awarded to the auctioneer is quite substantial.

10. I will accordingly grant a conditional stay in the interest of justice. The respondent is ordered to deposit a sum of one million (1 m) within thirty days of this ruling in an interest bearing account in a bank to be held in the joint names of the advocates. The respondent is given seven (7) days within which to file an

appeal. The respondents counsel to serve a notice upon the firm of **Mugoye and Associates Advocates** notifying them of their appointment to act in this matter within seven (7) days.

Costs of this application to the auctioneers.

RULING READ AND SIGNED ON 4TH JUNE 2010 AT NAIROBI.

M.K. KOOME
JUDGE